No. 22233

United States
COURT OF APPEALS
for the Ninth Circuit

STATE OF OREGON, by and through its State Highway Commission, composed of Glenn L. Jackson, Kenneth N. Fridley and David B. Simpson,

Appellant,

v.

Tug GO GETTER, et al including OLSON TOWBOAT CO., a California corporation,

Appellee.

APPELLEE'S ANSWERING BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

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STATEMENT OF JURISDICTION

Appellant, the State of Oregon, filed this proceeding in admiralty (R. 1), alleging jurisdiction under 28 U.S.C. 1333. Appellant then caused the District Court clerk to issue process of foreign attachment and

a United States Marshal seized appellee's tug, the VIRGINIA PHILLIPS, at Bandon, Oregon.

Appellee subsequently moved to dissolve the writ of foreign attachment (R. 26). The motion was supported by affidavits and counter and reply affidavits were also filed (R. 37, 42). After oral argument, appellee's motion was granted and an order was entered dissolving the writ (R. 50).

Appellant filed its notice of appeal from that order and apparently claims jurisdiction of this Court is conferred by 28 U.S.C. 1291. (Appellant's statement of jurisdiction refers to 28 U.S.C. 1991—Appellant's Brief 2).

STATEMENT OF THE CASE

This proceeding arises out of a collision between the dumb barge J. WHITNEY, while in the tow of the tug GO-GETTER, and the Oregon state highway bridge at Bullard, near Bandon, Oregon. The plaintiff made personal or substituted service of its original libel in rem (and subsequent amended complaint) on all defendants except the appellee, Olson Towboat Company. The State of Oregon sought to obtain jurisdiction over appellee by attaching its tug VIRGINIA PHILLIPS under a writ of foreign attachment.

This appeal presents three questions:

(1) Did the district judge commit error or abuse his discretion in determining that appellee was jurisdictionally present in the District of Oregon and

could have been found there for service of process had appellant made a reasonable effort to do so?

(2) Was appellant bound by the allegations of its original libel (and amended complaint) to the effect that one defendant (allegedly "not found" within the district) and another defendant (admittedly "found" within the district) are one and the same ("alter ego"), so as to preclude the use of foreign attachment against the allegedly "not found" defendant?

(3) Was appellant's affidavit, filed pursuant to Supplemental Rule B(1) of the Federal Rules of Civil Procedure, sufficient to sustain the issuance of the process of foreign attachment?

The practical effect of appellant's appeal is that appellant (a) is seeking to retain the benefit of the security it extracted from appellee after the attachment of the VIRGINIA PHILLIPS, and (b) is seeking to avoid any potential liability to appellee for appellee's loss sustained when the vessel was tied up under the writ of attachment for approximately three weeks.

Although it does not appear in the designated record, appellee subsequently appeared in the suit, filed an answer, counterclaim and cross-complaint, and claimed damages from appellant in the amount of $15,000.00 for its loss of use of the tug VIRGINIA PHILLIPS while held under process. Appellant has moved to dismiss this counterclaim, the matter has been argued to the District Court, and the motion to

dismiss denied, with leave to appellant to renew it after trial on the issues of liability. The District Court then consolidated the actions based on the petition for limitation of liability filed by Sause (the owners of the tug GO-GETTER), the appellant's amended complaint and the various cross-complaints. The Court segregated the issues of liability and right to limitation, from the issues of value of the GO-GETTER, the amount of damage sustained by appellant and the amount of appellee's damages, reserving the latter damage and value issues until after trial on the liability issues. The trial has been held on liability and right to limitation and the trial court is now awaiting preparation of a transcript of testimony and submission of trial briefs.

In appellant's affidavit for attachment (R. 9), made to comply with Supplemental Rule B(1) of the Federal Rules of Civil Procedure, one of appellant's attorneys, Mr. Patterson, stated he believed both defendant Oliver J. Olson & Company and defendant Olson Towboat Company were California corporations, and continued:

> "I checked the corporation division of the Commerce Department and ascertained that neither corporation is an Oregon corporation and *neither* corporation as a foreign corporation, if doing business in Oregon, is *not* qualified to do such and in any event has *no* registered agent to receive process in the State of Oregon." (Emphasis added)

Mr. Patterson further stated that he knew of no

officer or agent qualified to receive process and therefore stated "that each and both of said defendants cannot be found within the District of Oregon."

Subsequently, in an affidavit (R. 37) opposing appellee's motion to dissolve the attachment, another of appellant's counsel, Mr. Rohde, stated that prior to the filing of the action he checked the office of the Corporation Commissioner and found that neither Oliver J. Olson & Company nor Olson Towboat Company had qualified to do business in Oregon or had appointed an agent for service of process in the state. He continued:

> "I knew Oliver J. Olson & Company had an office in Coos Bay, Oregon, and that Mr. Miller represented that company. A check in the telephone directories in Portland and Coos Bay showed Oliver J. Olson & Company as being listed, but not Olson Towboat Company."

With its motion to dissolve the attachment appellee filed an affidavit (R. 26) of Thomas E. Miller, who is employed by both Oliver J. Olson & Company and Olson Towboat Company at Coos Bay, Oregon. Mr. Miller stated that he is the managing agent for appellee in Oregon and handles all of appellee's shoreside business in Oregon, such as "taking applications for employment, arranging for replacements and crew, repairs to the vessel, drydocking, dispatching the tugs, ordering necessary supplies, fuel, oil, etc., . . .". He continued that no inquiry was ever made of him and that it was his belief that if anyone had inquired on the waterfront in Coos Bay they would have been

advised that he (Miller) was Olson Towboat's managing agent.

Appellee also filed a reply affidavit (R. 42) of Samuel Holmes, one of its attorneys. Mr. Holmes stated, among other things, that he had spoken with Mr. Rohde prior to the attachment and that no inquiry had been made concerning Olson Towboat either doing business in Oregon or having an agent in the state. It was also set forth that Olson Towboat had "for a number of years" maintained an account with the State of Oregon's workmen's compensation fund.

SUMMARY OF ARGUMENT

(1) Appellee could have been "found" within the District of Oregon, both jurisdictionally and for service of process, and no reasonable effort to do so was made by appellant prior to its seizure of the tug VIRGINIA PHILLIPS.

(2) Appellant, in an attempt to improve its position in the main suit, alleged in a verified "libel" (complaint) that Oliver J. Olson & Company and Olson Towboat Company were one and the same (alter ego). It then ignored its allegation by claiming that Olson Towboat could not be found within the district, although admittedly its alter ego, Oliver J. Olson & Company, could be and was found within the district. Appellant should be bound by its pleadings.

(3) The original affidavit for attachment (R. 9) required under Supplemental Rule B(1) of the Fed-

eral Rules of Civil Procedure was insufficient in that it stated "that neither corporation is not qualified" (to do business in Oregon) and "in any event has no registered agent to receive process in the State of Oregon . . .". If the double negative was a mistake, there was ample opportunity to correct it during the hearing upon the motion.

ARGUMENT

This appeal is from an order granting appellee's motion and dissolving the writ of foreign attachment. We submit that the burden is on the appellant to show that the District Court's decision was "clearly erroneous." (*Seawind Compania, S.A.* v. *Crescent Line, Inc.*, 320 F.2d 580 (2nd Cir., 1963)).

An analogous factual situation arose in *Goodman* v. *United States*, 369 F.2d 166 (9th Cir. 1966). In affirming a district judge's quashing of service of subpoenas the appellate court stated:

> "Although the trial court gave no reason for quashing the subpoenas, we must assume that he did so because he found them to be unreasonable and oppressive. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, our inquiry is limited to finding out whether the ruling was clearly erroneous." (p. 169)

Despite the lack of written findings on the motion, it must be assumed that the District Court simply determined that appellee could have been "found" within the district under both prongs of inquiry. In addition to the motion, affidavits and memoranda, the

district judge had the benefit of oral argument and that unreported portion of the case is not now available as a part of the record. The question is whether the determination was "clearly erroneous." See, also, *McAllister* v. *United States*, 348 U.S. 19, 99 L. Ed. 20 (1954).

In addition appellant insists that the element of security is equal in importance to that of obtaining jurisdiction under a writ of foreign attachment. Admittedly, the decisions do speak of a dual purpose. (*Swift & Company Packers* v. *Compania Columbiana Del Caribe, S. A.*, 339 U.S. 684, 94 L. Ed 1206 (1950)). It is clear, however, that the primary object of the attachment is the obtaining of an appearance, while the obtaining of security for a libelant's claim is an incidental purpose. (*Manro* v. *Almeida*, 23 U.S. (10 Wheat.) 473, 6 L. Ed. 369 (1825)).

1. Appellee could have been found within the District had appellant made a reasonable effort to do so.

It is undisputed between the parties that on a motion to vacate a foreign attachment the essential issue is whether the respondent could have been "found" within the District. The quotation from *United States* v. *Cia Naviera Continental S.A.*, 178 F. Supp. 561 (S.D. N.Y., 1959) set forth in appellant's brief (p. 16-17) accurately defines the dual requirements of being found. Appellee was present under both of these requirements. The District Court was correct in vacating the attachment.

(A) Requirement Number One

The first inquiry is whether the appellee was present in the district by being susceptible to the jurisdiction of the Court. The standard here is not what appellant knew, but what the facts actually were.

In *United States* v. *Cia Naviera Continental, S.A., supra*, the respondent in a foreign attachment proceeding was held to have been present in the district and subject to the court's jurisdiction. Although respondent's principal place of business and site of incorporation were elsewhere and it had neither office nor telephone listing in the district, there was evidence of sufficient continuous business activity. Charter parties had been executed by a local company as "agents" for respondent and vessels belonging to respondent were berthed and repaired in the district. Respondent also maintained two accounts in local banks.

In the present case Thomas Miller stated by affidavit that he handled all of appellee's shoreside business in Oregon. Appellant quotes this statement and refers to it as a self-serving conclusion (Appellant's Brief, 17) in support of its contention of insufficient business activity. Appellant failed to include the full paragraph of the affidavit wherein Mr. Miller expanded upon the business done "such as taking applications for employment, arranging for replacements and crew, repairs to the vessel, drydocking, dispatching the tugs, ordering necessary supplies, fuel, oil, etc., as the case may arise" (R. 26). It is undisputed that Olson Towboat Company maintains an account

with the Oregon State Compensation Department and also files information returns with the Oregon State Tax Commission. It is difficult for appellee to understand how the activities enumerated above are less than those found to be sufficient by the New York court in *United States* v. *Cia Naviera Continental, S.A., supra.*

D/SA/S Flint v. *Sabre Shipping Corporation,* 228 F. Supp. 384 (E.D. N.Y. 1964), was another case in which a nonresident corporation's business activities were held to render it present under the first requirement of being "found" within the district. There respondent frequently loaded and unloaded cargo at a local pier and maintained records and a claims manager there.

In *Federazione Italiana D.C.A.* v. *Mandask Compania D.V.*, 158 F. Supp. 107 (S.D. N.Y., 1957), another motion to vacate a foreign attachment was granted. The respondent did not have a telephone or a building directory listing, nor did its name appear on its office door. The court held, however, that since a bank account was maintained, correspondence was sent and received, corporate books kept, an information listing recorded, and a corporate officer regularly present, all in the district, it was "plain that *if respondent had been served with process of this court, it could not have escaped this court's jurisdiction.*" (Emphasis added). While the enumerated activities were not identical to those carried on by Olson Towboat in Oregon, we submit that the result of the test emphasized above would be the same, i.e., if Olson

Towboat had been served it could not have avoided the district court's jurisdiction.

Appellant cites *Seawind Compania S.A.* v. *Crescent Line, Inc.*, 320 F.2d 580 (2nd Cir., 1963), as authority for the proposition that appellee's business activity was not sufficient to sustain jurisdiction here. The motion to vacate in that case, however, also was allowed. The court noted that although the keeping of corporate records and the presence of corporate officers might not be sufficient activity, the contract out of which the litigation arose was made and breached in the district. It was held that because of this activity the respondent could clearly be made subject to suit in New York, even in the absence of a resident agent expressly authorized to accept process.

As a final point in the present case it should be mentioned that the State of Oregon has provided by its so called "long arm" statute (ORS 14.035(1)) that any person or corporation transacting any business *or* committing a tortious act within the state is subject to the jurisdiction of Oregon courts. The federal district court has been held to have jurisdiction under this Oregon statute. (*Rosenlund* v. *Transnational Insurance Company*, 237 F. Supp. 599 (Or., 1964)). There can be little doubt that either the allegations of appellant's complaint or the business activity Olson Towboat carried on in the district would have subjected Olson Towboat to the jurisdiction of the Oregon court. The fact that this is an admiralty proceeding does not effect this conclusion. (*D/SA/S Flint* v. *Sabre Shipping Corporation, supra*)

> "Because neither Admiralty Rule 1, nor Rule 2, nor any of the other Admiralty Rules, specify the Territorial limits for effecting service of process we may look to the Federal Rules of Civil Procedure, in particular, and to state practice in determining where respondent was subject to service." (*Chilean Line* v. *U. S.*, 344 F.2d 757, 760 (2nd Cir., 1965)).

(B) Requirement Number Two

Once the question of whether appellee could have been "found" in the jurisdictional sense is resolved, the question which must next be answered is whether it could have been "found" for the service of process.[1]

Appellant attempts to imply that an unsuccessful search for a respondent may only be attacked and the ensuing writ of foreign attachment dissolved where the search is conducted in "bad faith." We respectfully suggest that this neither is nor should be the test. Appellant was required to use reasonable diligence to discover the presence of Olson Towboat for service of process. (*Seawind Compania S.A.* v. *Crescent Line, Inc.*, 320 F.2d 580 (2nd Cir., 1963); *Federazione Italiana D.C.A.* v. *Mandask Compania D.V.*, 158 F. Supp. 107 (S.D. N.Y., 1957)).[2]

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[1] Under the Oregon Foreign Corporation Act, ORS 57.655 (2) (i), a foreign corporation transacting business in interstate commerce is not required to qualify or to maintain of record an agent for service of process and hence appellant's inquiry to the Department of Commerce is not significant.

[2] Whatever the test or standard which is required for the allowance of damages in a wrongful attachment case may be, it has no relevance to the standard of conduct which is required to sustain a writ of foreign attachment.

There is no doubt that the marshal did not attempt to locate and serve an agent of the Olson Towboat Company. In fact, there is not even a "not found" return evidenced in the court file. While a marshal is not required to make a "fruitless search," he himself has a duty to endeavor to find the party before attaching property. (*The Valmar*, 38 F. Supp. 615 (E.D. Penn., 1941)).

In *Seawind Campania S.A.* v. *Crescent Line., Inc.*, *supra*, a claim was made that the respondent could not have been found for service of process. There was no dispute that managing agents had been present within the district at all times. Although a contract with the libellant had been signed by these agents, libellant contended that because the corporate name of respondent had been changed libellant no longer knew whether these agents were still officers of the respondent. The court decided that, even if libellant were ignorant of the continuing relationship of these agents, it must be assumed that appropriate inquiries would have revealed these facts. No such inquiries were made. Respondent was held to have been present and capable of being found.

Federazione Italiana S.C.A. v. *Mandask Compania D.V.*, *supra*, also involved a contention that the respondent could not be found. Libellant there knew that a corporate officer was present in the district. While the facts of that case were admittedly even stronger for dissolution than those in the present case, it should be noted that again the court called attention to the lack of inquiries made by the libellant.

Had appellant in this case bothered to make any inquiry at the place of business of a corporation alleged to be the "other self" of Olson Towboat Company, it could hardly have not learned that the latter was doing business in Oregon and had an agent to accept process. Appellant places great emphasis on the fact that, had any inquiry been made of Thomas Miller, the chance of attaching any Olson Towboat vessel would have been lost. The implication, of course, is that Mr. Miller would have lied and promptly warned all of appellee's tugs to stay out of Oregon waters. The fallacy of this logic is readily made apparent by a reading of appellant's own brief, reciting the series of events preceding the attachment. Appellant admits that Mr. Rohde spoke by telephone with, and received a letter from, Olson Towboat's attorney in San Francisco, Mr. Samuel Holmes, prior to taking any action (Appellant's Brief 22-23). If Mr. Holmes had wished to avoid an attachment he certainly had time to warn Olson vessels. A subsequent inquiry by appellant would, therefore, have given Thomas Miller no information which Olson Towboat did not already have. The opportunity for its vessels to "scamper" had already arisen.

Appellant also contends that Mr. Holmes "misrepresented" facts to Mr. Rohde concerning Mr. Miller being an Olson Towboat agent (Appellant's Brief 27). We suggest that this statement is particularly ill chosen. No such question was ever asked of Mr. Holmes. Again, appellant simply neglected or ignored an opportunity to make an inquiry which would have re-

sulted in its receiving information making an attachment improper (Affidavit of Samuel Holmes, p. 3—R. 42). Because Mr. Holmes did not volunteer the information, no inquiry having been made, appellant now seeks to justify its decision to "abandon any thought" that Thomas Miller was an Olson Towboat Company agent (Appellant's Brief 27). Appellant now claims that the court below wrongly evaluated the State's lack of due diligence.

There is also no evidence to contradict the statement in Mr. Miller's affidavit that:

> ". . . I believe that if anyone had inquired on the waterfront, particularly among any of the ship supply houses, oil docks, or other tugboat companies, he would have been advised that I am the managing agent for Olson Towboat Company in this state." (R. 26).

Again, no such inquiries were ever made by appellant or the marshal. The record sustains the proposition that time after time the appellant simply (or deliberately?) failed to ask questions. This is hardly consistent with the "due diligence" it claims to have exercised.

We have previously contended that the Oregon "long-arm" statute (ORS 14.035) can furnish a basis for the finding that Olson Towboat Company was present in Oregon in the jurisdictional sense. Carrying this argument to its logical conclusion, the same statute can also be said to have enabled appellant to find appellee for service of process.

Similar reasoning has been employed in other foreign attachment decisions. In *D/SA/S Flint* v. *Sabre Shipping Corporation*, 228 F. Supp. 384 (E.D. N.Y., 1964), the court assumed *arguendo* that respondent could not have been physically served within the district, but went on to consider the question of whether the respondent was nevertheless within reach of the process of the court. Judge Zavatt noted that methods of service prescribed by the Federal Rules of Civil Procedure are substantially the same as in the admiralty practice. Since the action was commenced in the eastern district of New York and respondent was present in the southern district, the court held that under Rule 4(f), which permits service of process anywhere within the state in which a United States District Court is located, the respondent could have been served in the southern district and the procedure of attachment rendered inapplicable. (See also, *Chilean Line* v. *U.S.*, 344 F.2d 757 (2nd Cir., 1965) and *S.S. Philippine Jose Abad Santos* v. *Bannister*, 335 F.2d 595 (5th Cir., 1964)).

The Court in the *Flint* case, *supra*, was only concerned with another district in the same state. Rule 4(f) also provides, however, that a summons may be served beyond the territorial limits of the state when authorized by the federal rules. Such authorization can be found in Rule 4(e), which provides in part:

> "Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons upon a party not an inhabitant of or found within the state . . . ,

service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

Under ORS 14.035, a state statute, service on Olson Towboat Company was authorized under either the doing of business section or the commission of an alleged tort section. Rule 4(e), in turn permitted the application of the state statute to the federal proceeding. Appellee could have been "found" by appellant for service of process even if it had not known of Thomas Miller being present in Oregon as appellee's agent.

2. Appellant should be bound by its allegations of "alter ego."

Appellant alleged in its libel (R. 1, paragraph VII) that appellee, Olson Towboat Company, was the alter ego of defendant Oliver J. Olson & Company. "Alter ego" is literally defined as meaning "other self." It means simply that the separate corporate entity of one corporation is disregarded and two corporations are regarded as one. The result is a piercing of the corporate veil. (See *National Bond Finance Co.* v. *General Motors Corporation*, 238 F. Supp. 248 (W. D. Mo., 1964.))

Appellant's motive in this instance for alleging that the two corporations are identical was to impose liability on defendant Oliver J. Olson & Company by charging it with responsibility for the alleged negligence of an Olson Towboat Company employee alleg-

edly acting within the scope of his employment. This was a legitimate allegation and appellant could well have benefited from proving the contention that these two defendants were not separable entities. However, appellant based its writ of attachment on the antipodal proposition that one of the corporations could be found in Oregon while the other could not.

In *Swift & Company Packers* v. *Compania Colombiana Del Caribe*, 339 U. S. 684, 94 L. Ed. 1206 (1950), a Colombian corporation's vessel was seized under a writ of foreign attachment. Prior to the attachment, but after potential liability became apparent, the vessel had been transferred to a second corporation. The second corporation was subsequently added as a defendant. Plaintiff claimed that the transfer was fraudulent and also alleged that the transferee was the "*alter ego*" of the transferor. While Justice Frankfurter's opinion dealt with the jurisdiction of the admiralty court to determine the issue of fraudulent transfer, he added the following footnote:

> "Libellants also sought to hold Del Caribe personally liable for the destruction of the Cali's cargo of rice on the ground that it was merely the alter ego of Transmaritime. Success on this theory would render the issue of fraudulent transfer irrelevant, for then the assets of either company could be attached . . ."

Appellee here contends that the converse is true. Under appellant's alter ego theory, if the Olson Towboat Company was the "other self" of Oliver J. Olson & Company, and Oliver J. Olson & Company was ad-

mittedly "found" within the jurisdiction, then the assets of neither corportaion could be subject to foreign attachment.

Although it does not appear in the record, at the time appellee's motion was orally argued the Court asked counsel for appellant if he would consent to abandoning the contention of alter ego. Counsel at that time indicated he would do so, but shortly thereafter advised the Court by letter that appellant would not withdraw that contention.

Appellant now contends that its allegation would "at most" indicate it knew that Oliver J. Olson & Company, rather than Thomas Miller, was the corporate agent of Olson Towboat Company (Appellant's Brief 27). We suggest that appellant misunderstands the concept of alter ego. It is wholly different from the concept of principal and agent. If Olson Towboat Company was the alter ego of Oliver J. Olson & Company and Thomas Miller the agent of the latter, then Miller, by appellant's own allegation, was also the agent of Olson Towboat. The fact that Olson Towboat was alleged to be the alter ego of Oliver J. Olson & Company, rather than vice versa, makes no difference.

In *U. S.* v. *Buffalo Weaving Co.*, 155 F. Supp. 454 (S.D. N.Y., 1956), an action was brought against an Ohio corporation and its two subsidiaries, one in Ohio and the other in New York. The president of the Ohio parent company was served with the process while at the office of the New York subsidiary. The

Ohio corporation moved to quash the service since it did no business in New York. It claimed it was unlicensed in that state, had no office or phone and kept no books or records there. The court found the separation of the corporations to be fictitious, held the parent was therefore doing business in New York, and sustained the service.

A Nevada case, *Frank McCleary Cattle Co.* v. *Sewell*, 73 Nev. 279, 317 P.2d 957 (1957), dealt with the effect of alter ego on an execution. A judgment was obtained against one corporation and the assets of another were executed on by the plaintiff who claimed one to be the alter ego of the other. After finding the corporations to be inseparable in terms of unities of interest and ownership, the court held them to be identical for purposes of execution. See also, *Intermountain Ford Tractor Co.* v. *Massey-Ferguson, LTD*, 210 F. Supp. 930 (Utah, 1962); affirmed, 325 F.2d 715 (10th Cir., 1963).

In all of the cases cited alter ego was applied and corporate forms were disregarded. The results were that separate entities were treated as one.

The relationship is more than merely principal and agent, as appellant apparently believes. In this case, the only agent was Thomas Miller. Under appellant's theory Miller was an agent for both Oliver J. Olson & Company and the Olson Towboat Company. Olson Towboat should have been "found" within the district and served by serving Mr. Miller. The remedy of foreign attachment was inapplicable by virtue of appellant's own allegations.

3. Appellant's original affidavit for attachment was insufficient to support issuance of a writ.

In its original affidavit appellant alleged that "neither" corporation had "no registered agent to receive process in the district of Oregon." We submit that this statement was the equivalent of an allegation that, for example, neither party was not at fault (in other words, both parties are at fault). Appellee conceded at the time of argument of the motion to dissolve, and concedes now, that this was probably a grammatical error and appellant probably intended to allege that "neither had an agent for service." The fact remains, however, that no effort was made to cure this defect, nor any supplemental affidavit filed (until Mr. Rohde's affidavit in opposition to the motion, R. 37), nor any petition made for leave to amend.

Supplemental Rule B(1) of the Federal Rules of Civil Procedure provides, in part, that a verified complaint may contain a prayer for process to attach a defendant's goods and chattels "if the defendant shall not be found within the District." The Rule continues: "Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that to affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the District." The affidavit here (through its double negative) actually alleged that appellee had a registered agent for service in the district. The original libel alleged (R. 1, paragraph V) that Oliver J. Olson & Company, a California corporation, had no registered

agent for service of process in the State of Oregon. It did not have a similar allegation as to appellee Olson Towboat Company.

CONCLUSION

It is respectfully submitted that the District Court's ruling vacating the foreign attachment was correct and without error. It is now apparent that appellant was primarily concerned with obtaining the tactical advantage of seizing security rather than following the legitimate paths to jurisdiction and service of process. Had appellant exercised the same degree of diligence in inquiring as to appellee's status that it displayed in seizing appellee's tug, it would have become obvious that both jurisdiction and service in the district were readily available. Affirming the lower court can hardly result in the remedy of foreign attachment becoming (as claimed by appellant) "too precarious for use by a responsible litigant." On the contrary, a reversal would invite abuse of that remedy and result in harassment and economic loss to a party suffering an attachment in circumstances where it was never intended to be used. The order of the District Court was sound and should be affirmed.

Respectfully submited,

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER H. EVANS, JR.
Of Attorneys for Appellee